

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)**

BETWEEN

ATTORNEY GENERAL OF QUEBEC

Appellant

-and-

A

Respondent

AND BETWEEN

B

Appellant

-and-

A

Respondent

AND BETWEEN

A

Appellant

-and-

B

Respondent

-and-

ATTORNEY GENERAL OF QUEBEC

Respondent

-and-

**WOMEN'S LEGAL EDUCATION AND ACTION FUND, ATTORNEY GENERAL OF NEW BRUNSWICK,
ATTORNEY GENERAL OF ALBERTA, FÉDÉRATION DES ASSOCIATIONS DE FAMILLES
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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Spousal relationships are marked by gender inequality. Women continue to earn less than men and to have primary responsibility for childcare and domestic labour.¹ As a result, women are economically disadvantaged on breakdown of spousal relationships.
2. The recognition of the “feminization of poverty” following relationship breakdown inspired a half century of family law reform across Canada. Married women are now entitled to spousal support and property sharing to recognize the economic interdependency of their relationships, and to compensate for the disadvantages suffered by them and corresponding advantages conferred on men by their unpaid labour in the home. In every province except Quebec, unmarried spouses are also now entitled to make claims for spousal support, and in four provinces/territories are entitled to make claims for property.
3. Unmarried spouses in Quebec, in contrast, may be left with nothing on relationship breakdown, regardless of economic integration or disadvantage arising from their cohabitation. These spouses have no access to the protections of spousal support or property sharing.
4. LEAF supports the decision by the Quebec Court of Appeal that the exclusion of de facto spouses from the spousal support provisions in the Civil Code of Quebec (CCQ) violates the guarantee of substantive equality under s. 15. However, LEAF submits that the Court of Appeal did not go far enough.
5. Spousal support is an important but insufficient remedy to the constitutional violation. A presumption of equal contributions and equal sharing of property at relationship breakdown is necessary to recognize and redress the gendered contributions and roles in de facto unions.
6. LEAF adopts the facts as summarized by Appellant A and in the Court of Appeal decision dated November 3, 2010.² In addition, LEAF relies on the following legislative facts:
 - a. The Civil Code of Quebec (CCQ) comprises a body of rules which represents, expressly or impliedly, the *jus commune* governing the people of the province.³ Unmarried couples, representing approximately 1.2 million people in Quebec, are not included within the provisions of the CCQ. At relationship breakdown, they are treated as strangers under the law and may only seek remedies in unjust enrichment or pursuant to a cohabitation agreement.

¹ Statistics Canada, *Economic Well-Being* by Cara Williams in *Women in Canada: A Gender-based Statistical Report* (Ottawa, December 2010) at 6, 13, 17.

² Court of Appeal judgment, Joint Record (D.C.), Part II, Vol. 1, p. 70-120.

³ Civil Code of Québec, S.Q. 1991, c. 64, preliminary provision.

- b. Couples who marry or enter into civil unions benefit from a range of equality-enhancing rights and obligations in the CCQ.⁴
 - c. The CCQ has designated certain provisions to be matters of “public order”.⁵ Married spouses may not contract out of these rights and obligations in advance of marital breakdown; at breakdown, any separation agreement/consent to judgment is subject to review by the court.⁶ De facto spouses may enter into separation agreements of their own volition, but they are not obliged to do so and do not benefit from any family law framework or judicial oversight.
 - d. Quebec is the only province in the country that does not allow de facto spouses access to a regime for spousal support.
 - e. Confusion abounds. The Quebec legislature recognizes de facto spouses as economically interdependent families in other respects, and has enacted approximately 30 social and economic laws to this effect with various definitions of spouse.⁷
7. Finally, LEAF highlights the following expert evidence:
- a. In 2006, 34.6% of cohabiting couples were de facto unions, as compared to 18.4% in the rest of Canada.⁸
 - b. In 2006, 45% of de facto families in Canada included at least one child.⁹
 - c. Statistics show that 60% of children in Quebec are born outside of marriage.¹⁰ Of that number, 46% are born to cohabiting parents; over 1/3 of all children in Quebec under the age of 14 reside with cohabiting parents.¹¹

⁴ Specifically, (i) spousal support, to relieve the negative economic consequences of the marriage and its breakdown (Art. 502); (ii) partition of the value of the family patrimony, which includes the family residence, furniture, family automobiles, RRSPs and pension plans (Art. 414 to 426); (iii) use and habitation of the family residence (Art. 401 to 413); (iv) equal sharing of property acquired during the marriage, pursuant to the partnership of acquests, unless otherwise provided by a marriage contract (Art. 448-460); and (v) compensatory allowance, to compensate one spouse for the monetary or non-monetary enrichment of the other (Art 427 – 430).

⁵ See the provisions relating to spousal support, family patrimony, use and habitation of the family home, and the compensatory allowance. As can be seen in the legislative debates at Exhibit PGQ – 20, Joint Record, Vol. 18, 55ff., the *Act Respecting Economic Equality of the Spouses*, which established family patrimony as a unique category of property and of public order, was initiated as a form of protection for women. See also Christian Labonte, “Le patrimoine familial” in Éditions Yvon Blais ed., *Collection de droit 2006 – 2007*, Vol. 3, Personne, Famille et Successions at 243.

⁶ Civil unions (when there are no minor or dependent children involved) can be dissolved by a notary. There is no need to go through the courts, and therefore no systematic review of the agreement (Art 521.13, CCQ).

⁷ For example, under the *Individual and Family Assistance Act*, R.S.Q., chapter A-13.1.1, de facto spouses are spouses after cohabiting for one year. Recipients must include any income earned by a de facto spouse as household income, and the de facto spouse is held jointly and severally liable for repayment of any sums received by the recipient during the course of the relationship. In the case of the Surviving Spouse’s Pension under *An Act respecting the Québec Pension Plan*, R.S.Q., chapter R-9, de facto spouses must cohabit for three years or be the parents of a child; a de facto spouse continues to be entitled to the pension even if she subsequently remarries or enters into a civil union.

⁸ Court of Appeal judgment, *supra* note 2 at para. 12, citing Zheng Wu, *Cohabitation: A Socially Protected Institution* (Department of Sociology, University of Victoria, February 28, 2008) at 9, and Statistics Canada, *Family portrait: Continuity and Change in Canadian Families and Households in 2006*, 2006, Census, Families and Households, No. 97-553-XIF in the online catalogue: www.statcan.gc.ca.

⁹ Zheng Wu, Exhibit R-151, Joint Record, Vol. 8, p. 34 and Table 4 (appendix).

- d. The legal effects of marriage are not a factor in decision-making; rather, most people formulate their relationship decisions according to personal beliefs and needs, and not based on their legal rights and obligations.^{12,13}
- e. Relationship breakdown leaves de facto spouses in similar economically disadvantaged positions as married spouses;¹⁴ female de facto spouses experience a decline in economic status upon relationship breakdown that is parallel to that experienced by divorcing women.¹⁵
- f. There is a profound lack of knowledge among de facto spouses in Canada generally, and Quebec specifically, regarding the consequences of relationship breakdown, and the rights and obligations of unmarried couples as compared to married couples.¹⁶
- g. Studies in other Western jurisdictions show that many de facto spouses are unaware that they fall outside the boundaries of the law;¹⁷ in fact, in a 2006 U.S. study, 60% of cohabiting couples believed they had the same rights as married spouses.¹⁸

PART II – POINTS IN ISSUE

8. The family law provisions of the CCQ protect married persons to the exclusion of de facto spouses. This exclusion is based on historical prejudices against de facto unions, and false stereotypes – positive and negative – about the nature of these relationships. Matrimonial rights and obligations under the CCQ were developed to redress gendered inequalities in spousal relationships, caused largely by women's childbearing and caregiving roles. Failing to extend these equality-promoting protections to de facto spouses discriminates on the basis of marital status and prevents women, frequently mothers, from sharing the wealth created by their efforts post-separation. The time is ripe for this Court to reconsider *Nova Scotia (Attorney General) v. Walsh*,¹⁹ having the benefit of a proper evidentiary record.

PART III – ARGUMENT

9. Marital status is an analogous ground of discrimination under s. 15.²⁰ Legislation which protects married couples to the exclusion of unmarried couples creates a distinction on that basis.²¹

¹⁰ Court of Appeal judgment, *supra* note 2 at para. 12, citing among other sources H        , Report drafted for Goldwater, Dub  , Updated version (Montreal: Institut national de la recherche scientifique, Urbanization, Culture and Society, March 2008); Institut de la Statistique du Qu      , La diffusion des naissances hors mariage, 1950-2003, La situation d             au Qu      , Bilan 2004.

¹¹ Wu, *supra* note 9 at p. 34, citing Milan, Vezina and Wells (2007) and Institut de la Statistique Qu       (2008).

¹² H        , Exhibit R-153, Joint Record, Vol. 8, at p. 131.

¹³ Wu, *supra* note 9 at p. 33, citing Barlow and Duncan (2000).

¹⁴ Wu, *ibid.* at p. 27, citing Avellar and Smock (2005).

¹⁵ Wu, *ibid.*

¹⁶ Belleau, *supra* note 12.

¹⁷ Wu, *supra* note 9 at p. 36, citing UK Law Commission (2006).

¹⁸ Wu, *ibid.*, citing Barlow (2006).

¹⁹ *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 [*Walsh*].

²⁰ *Miron v. Trudel*, [1995] 2 S.C.R. 418 [*Miron*] at para. 170.

10. Having identified a formal distinction between married and unmarried spouses, however, the Court must dig deeper. While tempting in this case, relying on a formal equality analysis takes the focus away from the perspective of the rights holder, and the social, political and economic reality in which the claimant, and others like her, live. *Withler* requires this Court to focus on the effects of the exclusion from the legislation, not on the sameness or difference between the two groups.²²
11. The Court must place itself in the shoes of the claimant. A contextualized understanding of the lived experiences of de facto spouses reveals that it is the economically less powerful spouse who is in need of financial remedy following relationship breakdown.²³ The situation of the economically less powerful spouse has been historically created through gender roles and stereotypes which inhere in the spousal relationship. While it is usually women who are in this economically less powerful situation, the gendered equality analysis applies to same sex relationships and to men who take on a stereotypically female spousal role.²⁴

The distinction perpetuates disadvantage and prejudice, and stereotypes the claimant group

(a) Disadvantaging effects

12. The gendered inequalities of the spousal relationship are so deeply entrenched and naturalized, even romanticized, in Canadian society that their negative consequences are unanticipated at the outset of the relationship and are often only rendered visible at the time of relationship breakdown.
13. In *M. v. H.*, Cory J. highlighted “that women in common law relationships often tended to become financially dependent on their male partners because they raised their children and because of their unequal earning power”.²⁵ The phenomenon is particularly pronounced in Quebec, which has the highest proportion of de facto unions in the country, and indeed in the world.²⁶
14. In Quebec, the availability of shelter and capital to the economically vulnerable de facto spouse is precarious. Remedies in unjust enrichment are inadequate, difficult to obtain and, as a result of the heavy

²¹ *Walsh*, *supra* note 19 at para. 32.

²² *Withler v. Canada (Attorney General)*, 2011 SCC 12 [*Withler*] at para. 64.

²³ *Moge v. Moge*, [1992] 3 S.C.R. 813 [*Moge*]. See also: Marie Gordon, “What, Me Biased?” Women and Gender Bias in Family Law” (2001) 19 C.F.L.Q. 53 (WL).

²⁴ Except, of course, to the extent that men continue to out-earn women in the workplace: *supra* note 1.

²⁵ *M. v. H.*, [1999] 2 S.C.R. 3 at para. 54. See also: *Moge*, *supra* note 29 at 853-854; *Peter v. Beblow*, [1993] 1 S.C.R. 980 [*Peter*] at para. 19; *Miron*, *supra* note 20 at para. 97; and *Schreyer v. Schreyer*, 2011 SCC 35 at para. 38.

²⁶ Louise Langevin, “Liberté de choix et protection juridique des conjoints de fait en cas de rupture : difficile exercice de jonglerie” (2009) 54 McGill L.J. 697 at 699.

burden and cost of litigation, out of reach for many.²⁷ While some judges have awarded exclusive possession of the family home to the non-owning de facto spouse, this remedy is not found in the CCQ and is rare, uncertain, and in every case requires the presence of children.²⁸

15. Child support assists with the cost of care for children, but is by no means sufficient to ground the economic well-being of a single parent household. For example, where the payor earns an income of \$255,613 per year and the recipient earns approximately \$16,956, the provincial child support guidelines in Quebec provide that child support is payable in the amount of \$1,618 per month.²⁹ This is in stark contrast to the \$3,217 payable under the Federal Guidelines; if she resided in Ontario, her mid-range Spousal Support Advisory Guidelines entitlement would be \$4,579 per month.
16. The interests affected by the exclusion are of fundamental importance, and go to the very core of the claimant's ability to live and to provide shelter and sustenance for herself and her family. Where the stakes are so high, it is inappropriate to place the onus of opting-in to the matrimonial rights and obligations onto the spouse who wields the least power. This principle was expressly endorsed by the Court in *M. v. H.*: "In sum, neither the common law equitable remedies nor the law of contract are adequate substitutes for the FLA's [*Family Law Act*] spousal support regime. Indeed, if these remedies were considered satisfactory there would have been no need for the spousal support regime, or its extension to unmarried, opposite sex couples."³⁰

²⁷ Since 2008, there have been 85 reported cases across the country citing *Peter v. Beblow*, *supra* note 25, and *Kerr v. Baranow*, 2011 SCC 10 [*Kerr*], in which unmarried cohabitants have sought remedies in unjust enrichment. In 76.5% of these cases, the claimants were women. Of these female claimants, 55% were in a relationship that was characterized as either "traditional" or "quasi-traditional" in nature, meaning that the woman was responsible for a significant amount of domestic work and/or child-care duties throughout the duration of the relationship. Of the cases brought by women, approximately 70% were successful, though in the majority of those cases the amount awarded was less than the amount sought. These numbers must also be understood in the context of the family law court proceeding where most cases settle and the balance of power in negotiations is gendered, see Craig Martin, "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998) 56 U. Toronto Fac. L. Rev. 135, and where the average cost of a contested divorce case is \$12,875, and a two-day civil trial is \$24,318; Robert Todd, "The Going Rate" Canadian Lawyer (June 2011) 32, at 34. See also, Tracey Tyler, "A 3-day trial likely to cost you \$60,000" *The Toronto Star* (3 March 2007), online: <http://www.thestar.com/News/article/187854>. See also: Berend Hovius, "Property Disputes Between Common-Law Partners: The Supreme Court of Canada's Decisions in *Vanasse v. Seguin* and *Kerr v. Baranow*" (2011) 30 CFLQ 129; Philip M. Epstein, "Annotation to *Kerr v. Baranow* and *Vanasse v. Seguin* and *Rubin v. Gendemann*" (2011), 93 R.F.L. (6th) 192.

²⁸ Robert Leckey, "Family Outside the Book on the Family" (2009) 88 Canadian Bar Review 547 at 560-561.

²⁹ See for example, *Droit de la famille* – 091889, 2009 QCCS 3389 at paras. 58-61; *Droit de la famille* – 10897, 2010 QCCA 793; leave to appeal granted, 410 N.R. 400 (note) (S.C.C. Oct 21, 2010). As Quebec is a designated province, the provincial guidelines apply in place of the Federal Guidelines, except in certain circumstances, ie, where the payor resides outside the jurisdiction.

³⁰ *M. v. H.*, *supra* note 25 at para. 124.

17. Similarly, it is no answer to Appellant A's claims for equal access to a property-sharing regime that she can sue under the CCQ in unjust enrichment (even assuming that this Court's decision in *Kerr v. Baranow* would have a substantive effect on the law in Quebec³¹), or that she could have negotiated a cohabitation agreement. Placing this onus on the claimant is unfair and infringes her right to equality before and under the law.
18. With no right to shelter, capital, or income support, an unmarried cohabitant is often unable to provide the bare minimum for her family. To require a former spouse to pursue a remedy for spousal inequality through these laborious, expensive, and uncertain legal mechanisms that were designed for "strangers" under the law is discriminatory.
19. Evidence about de facto unions clearly indicates that married persons and de facto spouses have the same needs at separation; in Quebec, these relationships are commonly referred to as "paperless marriages", "unmarried marrieds", "common law spouses", and "de facto spouses".^{32,33} LEAF is asking this Court to continue its role as an international leader in promoting a functional view of the family, recognizing the value of contributions made by women and the corresponding benefits received by men in family relationships, irrespective of labels and status.³⁴
20. The existence of matrimonial regimes in each of the provinces, and their legislative histories, is evidence itself that an opt-in regime favours the economically powerful family member, to the exclusion of the

³¹ It is unclear whether courts in Quebec are willing to apply the joint family venture (JFV) analysis, as developed in *Kerr*, in unjust enrichment claims between de facto spouses. To date, only six reported decisions in Quebec have referenced *Kerr*. None of these cases apply a JFV analysis; in one case, the court expressly refused to consider it: *Brousseau v. Cloutier*, 2011 QCCQ 8647 at paras. 20-23, citing *B. (M.) v. L.(L.)*, 2003 Can LII 47977 (QC CA).

³² Wu, *supra* note 9. Professor Wu also explains throughout his report that (a) all unions, whether marriage, civil union or common law, are subject to instability in the first 4 years, p. 30; (b) a large percentage of common law relationships are long term and enduring, p.31; and (c) that "cohabitants tend to report levels of commitment that are little different from that present in marriage", p. 29.

³³ Even if de facto unions cannot be understood in a uniform way, all members of spousal relationships deserve access to the court to determine whether or not there is a rightful claim to both property and support. The Court retains discretion in cases where there is no entitlement to spousal support, and in most provinces has at least minimal discretion to adjust property sharing where circumstances warrant: see for example, Art. 471 of the CCQ, and s. 5(6) of the *Family Law Act*, R.S.O. 1990, c. F.3, and acknowledged in the support context by Court of Appeal judgment, *supra* note 2 at para. 115, citing *Ross v. Taylor*, 1998 ABCA 193.

³⁴ Consider our evolution of the concept of family across the country: (i) illegitimacy, *Tighe (Guardian ad litem of) v. McGillivray Estate* (1994), 127 N.S.R. (2d) 313 (C.A.); (ii) recognition of women's contributions to common law spousal relationships, *Peter*, *supra* note 25 and *Kerr*, *supra* note 27; (iii) acknowledging spousal support as a tool to address gender inequality post-separation, *Moge*, *supra* note 23; (iv) equal treatment for common law couples for automobile accident benefit unmarried spouses, *Miron*, *supra* note 20; (v) expanding the definition of spouse to include same-sex couples, pursuant to the spousal support provisions of the Ontario *Family Law Act*, *M. v. H.*, *supra* note 25; (vi) expanding the scope of *in loco parentis*, with respect to child support obligations, *Chartier v. Chartier*, [1999] 1 S.C.R. 242; (vii) same-sex marriage, *Halpern v. Canada (Attorney General)* (2003), 65 OR (3d) 161 (C.A.); (viii) three-parent families, *A.A. v. B.B.* (2007), 83 O.R. (3d) 561 (C.A.).

lower-earning spouse and the children. This point resonates particularly with respect to the family patrimony provisions, which were enacted as a result of a legislative decision that families, and particularly women, are vulnerable and in need of protection following relationship breakdown. The legislative decision to designate certain provisions, specifically spousal support and family patrimony as being of public order, is further evidence that they are fundamental to the equality of the economically disadvantaged spouse.³⁵

21. This Court should recognize that property sharing following breakdown of all spousal relationships is fundamental to the protection of economically vulnerable family members. In fact, four provinces/territories have already recognized and sought to address the injustices borne by unmarried cohabitants, largely women, by including them in the default property-sharing regime.³⁶
22. Most recently, British Columbia has introduced legislation which extends matrimonial rights and obligations to de facto spouses,³⁷ following robust consultations which revealed “that many people do not know what the consequences of marriage are.”³⁸ Equal treatment of married and unmarried cohabitants with respect to property and support simply “recognizes that the number of common-law relationships is on the rise and that the vehicle of constructive trust claims inadequately protects the interests of this growing number of unmarried spouses.”³⁹
23. Equal protection for unmarried cohabitants on relationship breakdown recognizes “the social reality of common-law spouses” and is reflective of the evidence that heterosexual couples in common-law relationships believe that they are subject to the same rights and obligations as married spouses.⁴⁰

³⁵ *Supra* note 5.

³⁶ In Manitoba, *The Family Property Act*, C.C.S.M. c.F.25, s.2.1(1), Saskatchewan, *The Family Property Act*, S.S 1997, c. F-6.3, s.2.1, Northwest Territories, *Family Law Act*, SNWT 1997, c 18, s. 1(1), Nunavut, *Family Law Act*, SNWT (Nu) 1997, c 18, s. 1(1), and, recently proposed in British Columbia, Bill 16 – 2011, unmarried cohabitants fall within the scope of the matrimonial property regime, once they have lived together for a legislated period of time or are the parents of a child. The variations in approaches across the country contribute to the misinformation available to de facto spouses and increases the prospect for misunderstanding about their rights and obligations.

³⁷ Bill 16 - 2011, *Family Law Act*, 4th Sess., 39th Leg., British Columbia, 2011 (first reading), s. 3(1) and Part 5.

³⁸ British Columbia, Ministry of Attorney General Justice Services Branch, *White Paper on Family Relations Act Reform*, (British Columbia: Civil Policy and Legislation Office, July 2010) at p. 83 (online:

<http://www.ag.gov.bc.ca/legislation/family-relations-act/pdf/Family-Law-White-Paper.pdf>).

³⁹ *Ibid.*

⁴⁰ Manitoba, Legislative Assembly, *Hansard*, No. 68 (22 July 2002) at 14:30 (Hon. Gord Mackintosh, Minister of Justice and Attorney General).

24. The exclusion of de facto spouses from a default property regime fails to take into account the real and present disadvantage of de facto spouses, and perpetuates an ongoing vulnerability for women and their children.

(b) Perpetuating prejudice

25. Until 1980, de facto unions in Quebec were known as “concubinage”, contrary to public morals and order. Even as late as 1991, when the new CCQ was enacted, the government sought to protect marriage “as an institution that includes...stability for the family”.⁴¹
26. The Appellant B and the Attorney General of Quebec argue that de facto unions are no longer socially unacceptable and that their exclusion from the CCQ celebrates, rather than demeans, their family form. However, this approach conflates commonality with lack of stigma. Even though de facto unions have become more common in Quebec, they continue to be treated as inferior, lesser relationships in society and most importantly under the law,⁴² both in Quebec and elsewhere in the country. The Attorney General’s argument that freedom of choice must be respected also fails to take into account that the government, in establishing certain provisions as being of public order, has already decided that some protections are so important as to be immutable. The total exclusion de facto spouses from the CCQ is evidence of the ongoing belief that such unions are second class and their members are not worthy of protection.

(c) Stereotyping and the illusion of choice

27. Relying on this Court’s decision in *Walsh*, the Appellant B and the Attorney General of Quebec cast de facto spouses as autonomous actors, in relationships characterized by an equality of power and participation. This assumption of equality ignores the relationships of power and powerlessness and the systemic inequalities that restrict women’s abilities to choose the structure and tenor of their intimate relationships, and is an *ex post facto* justification for perpetuating a historical stereotype. The use of the claimant’s “choice” not to marry in order to insulate unmarried spouses from s. 15 scrutiny is premised on a combination of assumptions that have a discriminatory impact and is a denial of equality rights.

⁴¹ Court of Appeal judgment, *supra* note 2 at paras. 88-89, citing comments made by the Minister of Justice during the parliamentary committee study of Bill 125 on September 5, 1991.

⁴² Solange! Maldonado, “Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children” (2011) 63 Fla L. Rev. 345 at 370. See also, for example: Ontario Human Rights Commission, *Policy on Human Rights and Rental Housing* (July 21, 2009) at 21 (online: http://www.ohrc.on.ca/en/resources/Policies/housing?page=Policy-III_.html).

28. *Walsh* represented a departure from this Court's traditional approach to the functional family. Because of the deficient record in that case, the Court accepted the following distinctions between de facto unions and married unions: that married and unmarried cohabitants are informed and aware of the legislative regime distinguishing between them on relationship breakdown; that unmarried cohabitants "have not undertaken... a positive intention to contribute and share in each other's assets and liabilities";⁴³ and that, as a result, unmarried cohabitants have made a "conscious choice"⁴⁴ not to be subjected to the protections afforded married persons.
29. There is, however, no evidence to support these assumptions.
30. Rather, sociological evidence that is now available to this Court shows that choice can be constrained by many factors, including that the more economically powerful spouse holds a veto over any request to marry.⁴⁵ This was expressly recognized by this Court in *Miron*: "In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints — these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control."⁴⁶
31. In this sense, the "choice" to marry or not to marry is a misnomer, because it implies a unilateral and autonomous decision-making process that simply does not exist. There can be no freedom to choose where one partner holds a veto over the other partner's choice. Indeed, where misinformation about the different legal obligations between married and unmarried spouses abounds, even the idea of choice is illusory: "Must the law deprive people of a benefit if they are unable to convince their partners to make the relationship official and offer immunity to the spouse who wishes to live in a conjugal relationship without assuming the moral obligations that flow from this choice?"⁴⁷
32. In effect, the Attorney General of Quebec has swapped a flawed and antiquated stereotype — de facto spouses as morally reprehensible — for an equally flawed but modern one — de facto spouses as equal and autonomous actors. It is asking this Court to endorse the discrimination on that basis.

⁴³ *Walsh*, *supra* note 19 at para. 54.

⁴⁴ *Ibid.* at para. 55.

⁴⁵ *Wu*, *supra* note 9 at p. 28.

⁴⁶ *Miron*, *supra* note 20 at para. 163.

⁴⁷ Court of Appeal judgment, *supra* note 2 at para. 194, per Beauregard J.A. (concurring).

Conclusion

33. Justice L'Heureux-Dube's dissent in *Walsh* is supported by the evidence before this Court, and equality requires that all spousal relationships have the same essential ground rules and basic protections. That is the legacy of *M. v. H.* and the fundamental purpose of s. 15. The vulnerabilities of economically dependent spouses have been addressed for those with a marriage certificate. The total exclusion of unmarried spouses from matrimonial rights and obligations, based as it is on historical prejudice and illusory assumptions about de facto spouses, perpetuates the inequality.
34. It is predominantly women with children, in economically dependent relationships, who require protection in the wake of relationship breakdown. To remedy and prevent discrimination – the goal of s. 15 – more is required than the assumption that a historically disadvantaged group is no longer disadvantaged. Equality demands that matrimonial rights and obligations be extended to de facto spouses.

Section 1

35. There is no pressing and substantial objective to the exclusion of de facto spouses. The laudatory purpose of the impugned provisions is to equitably share the economic consequences of spousal relationships after separation. The exclusion of de facto spouses is not rationally connected to that purpose. If the purpose of the legislation is to protect only married people to the exclusion of de facto spouses based on their different “choice”, that alleged purpose is discriminatory; it is based on a stereotype that has the effect of disadvantaging women and children.

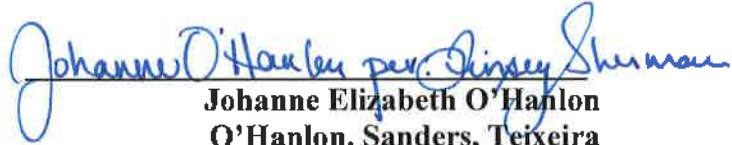
PART IV – COSTS

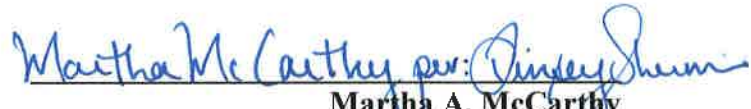
36. LEAF does not seek costs and submits that no order for costs should be made against it.

PART V – ORDERS SOUGHT

37. LEAF submits that de facto spouses should be read in to the Quebec legislation, such that de facto spouses receive equivalent rights and obligations as married spouses. This approach is the most effective way to protect women in de facto relationships and is most consistent with the court's duty under the Charter to devise a purposive and rights-respecting remedy.
38. LEAF requests permission to make oral arguments at the hearing, in order to further develop its unique perspective on the issues before the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF DECEMBER, 2011


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Martha McCarthy & Company

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Women's Legal Education and Action Fund (LEAF)

PART VI – AUTHORITIES

<u>Cases</u>	<u>Para. Nos.</u>
<i>A.A. v. B.B.</i> (2007), 83 O.R. (3d) 561 (C.A.)	19
<i>B. (M.) v. L(L.)</i> , 2003 Can LII 47977 (QC CA)	17
<i>Brousseau v. Cloutier</i> , 2011 QCCQ 8647	17
<i>Chartier v. Chartier</i> , [1999] 1 S.C.R. 242	19
<i>Droit de la famille – 091889</i> , 2009 QCCS 3389	15
<i>Halpern v. Canada (Attorney General)</i> (2003), 65 OR (3d) 161 (C.A.)	19
<i>Kerr v. Baranow</i> , 2011 SCC 10	14, 17, 19
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<i>Miron v. Trudel</i> , [1995] 2 S.C.R. 418	9, 13, 19, 30
<i>Nova Scotia (Attorney General) v. Walsh</i> , 2002 SCC 83	8, 27, 28
<i>Peter v. Beblow</i> , [1993] 1 S.C.R. 980	13, 14, 19
<i>Schreyer v. Schreyer</i> , 2011 SCC 35	13
<i>Tighe (Guardian ad litem of) v. McGillivray Estate</i> (1994), 127 N.S.R. (2d) 313 (C.A.)	19
<i>Withler v. Canada (Attorney General)</i> , 2011 SCC 12	10

<u>Secondary Sources</u>	<u>Para. Nos.</u>
Berend Hovius, “Property Disputes Between Common-Law Partners: The Supreme Court of Canada’s Decisions in <i>Vanasse v. Seguin</i> and <i>Kerr v. Baranow</i> ” (2011) 30 CFLQ 129	14
Christian Labonte, “Le patrimoine familial” in Éditions Yvon Blais ed., <i>Collection de droit 2006 – 2007</i> , Vol. 3, Personne, Famille et Successions	6
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Louise Langevin, “Liberté de choix et protection juridique des conjoints de fait en cas de rupture : difficile exercice de jonglerie” (2009) 54 McGill L.J. 697	13

Marie Gordon, “‘What, Me Biased?’ Women and Gender Bias in Family Law” (2001) 19 C.F.L.Q 53 (WL)	11
Philip M. Epstein, “Annotation to Kerr v. Baranow and Vanasse v. Seguin and Rubin v. Gendemann” (2011), 93 R.F.L. (6th) 192	14
Robert Leckey, “Family Outside the Book on the Family” (2009) 88 Canadian Bar Review 547	14
Robert Todd, “The Going Rate” Canadian Lawyer (June 2011) 32	14
Solangel Maldonado, “Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children” (2011) 63 Fla L. Rev. 345	26
Statistics Canada, <i>Economic Well-Being</i> by Cara Williams in <i>Women in Canada: A Gender-based Statistical Report</i> (Ottawa, December 2010)	1
Tracey Tyler, “A 3-day trial likely to cost you \$60,000” The Toronto Star (3 March 2007), online: http://www.thestar.com/News/article/187854	14

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British Columbia, Ministry of Attorney General Justice Services Branch, <i>White Paper on Family Relations Act Reform</i> , (British Columbia: Civil Policy and Legislation Office, July 2010) (online: http://www.ag.gov.bc.ca/legislation/family-relations-act/pdf/Family-Law-White-Paper.pdf)	22
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Legislation

<i>An Act respecting the Québec Pension Plan</i> , R.S.Q., chapter R-9	6
<i>Civil Code of Quebec</i> , Preliminary provision, Art. 401 - 430; Art. 448-460; Art. 471; Art. 521.13	6, 19
<i>Family Law Act</i> , R.S.O. 1990, c. F.3, s. 5(6)	19
<i>The Family Property Act</i> , C.C.S.M. c.F.25, s.2.1(1)	21
<i>The Family Property Act</i> , S.S 1997, c. F-6.3, s.2.1	21

Family Law Act, SNWT 1997, c 18, s. 1(1)

21

Family Law Act, SNWT (Nu) 1997, c 18, s. 1(1)

21

Individual and Family Assistance Act, R.S.Q., chapter A-13.1.1

6

<i>An Act respecting the Québec Pension Plan, R.S.Q., chapter R-9, s. 91</i>	<i>Loi sur le régime de rentes du Québec, LRQ, c R-9, s. 91</i>
<p>91. Subject to section 91.1, any person who, on the day of the death of the contributor,</p> <p>(a) is married to the contributor and is not legally separated from bed and board;</p> <p>(a.1) is in a civil union with the contributor; or</p> <p>(b) provided the contributor is either legally separated from bed and board or neither married nor in a civil union on the day of his death, has been living with the contributor, whether the person is of the opposite or the same sex, in a de facto union for at least three years or, in the following cases, for at least one year:</p> <ul style="list-style-type: none"> — a child was or is to be born of their union, — they have, together, adopted a child, — one of them has adopted a child of the other, <p>qualifies as a surviving spouse.</p> <p>For the purposes of subparagraph b of the first paragraph, the birth or adoption of a child prior to the period of de facto union in progress on the day of the death of the contributor, may enable a person to qualify as a surviving spouse.</p>	<p>91. Se qualifie comme conjoint survivant, sous réserve de l'article 91.1, la personne qui, au jour du décès du cotisant:</p> <p>a) est mariée avec le cotisant et n'en est pas judiciairement séparée de corps;</p> <p>a.1) est liée par une union civile au cotisant;</p> <p>b) vit maritalement avec le cotisant, qu'elle soit de sexe différent ou de même sexe, pourvu que ce dernier soit judiciairement séparé de corps ou non lié par un mariage ou une union civile au jour de son décès, depuis au moins trois ans ou, dans les cas suivants, depuis au moins un an:</p> <ul style="list-style-type: none"> — un enfant est né ou à naître de leur union, — ils ont conjointement adopté un enfant, — l'un d'eux a adopté un enfant de l'autre. <p>Pour l'application du paragraphe b du premier alinéa, la naissance ou l'adoption d'un enfant avant la période de vie maritale en cours au jour du décès du cotisant peut permettre de qualifier une personne comme conjoint survivant.</p>

<i>Civil Code of Quebec, S.Q. 1991, c. 64</i>	<i>Code Civil du Québec, L.Q. 1991, c. 64</i>
Art. 401 - 430; Art. 448-460, 502: See the Factum of the Appellant A.	
<p>Preliminary provision</p> <p>The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property.</p> <p>The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the <i>jus commune</i>, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.</p>	<p>Disposition préliminaire</p> <p>Le Code civil du Québec régit, en harmonie avec la Charte des droits et libertés de la personne et les principes généraux du droit, les personnes, les rapports entre les personnes, ainsi que les biens.</p> <p>Le code est constitué d'un ensemble de règles qui, en toutes matières auxquelles se rapportent la lettre, l'esprit ou l'objet de ses dispositions, établit, en termes exprès ou de façon implicite, le droit commun. En ces matières, il constitue le fondement des autres lois qui peuvent elles-mêmes ajouter au code ou y déroger.</p>
<p>Art. 471</p> <p>A spouse who has misappropriated or concealed acquests, wasted acquests or administered them in bad faith forfeits his or her share of the acquests of the other spouse.</p>	<p>Art. 471</p> <p>Un époux est privé de sa part dans les acquêts de son conjoint s'il a diverti ou recelé des acquêts, s'il a dilapidé ses acquêts ou s'il les a administrés de mauvaise foi.</p>
<p>Art. 521.13</p> <p>The spouses may consent, by way of a joint declaration, to the dissolution of the civil union provided they settle all the consequences of the dissolution in an agreement.</p> <p>The declaration and the agreement must be executed before a notary and recorded in notarial acts <i>en minute</i>.</p> <p>The notary may not execute the declaration before the agreement is recorded in a notarized transaction contract. The notary must inform the spouses beforehand of the consequences of the dissolution and make sure that they truly consent to the dissolution and that the agreement is not contrary to imperative provisions of law or public order. If appropriate, the notary may provide</p>	<p>Art. 521.13</p> <p>Les conjoints peuvent consentir, dans une déclaration commune, à la dissolution de leur union s'ils en règlent toutes les conséquences dans un accord.</p> <p>La déclaration et l'accord doivent être reçus devant notaire et constatés dans des actes notariés <i>en minute</i>.</p> <p>Le notaire ne peut recevoir la déclaration avant que l'accord ne soit constaté dans un contrat de transaction notarié. Au préalable, il doit informer les conjoints des conséquences de la dissolution et s'assurer que le consentement de ceux-ci est réel et que l'accord n'est pas contraire à des dispositions impératives ou à l'ordre public. Il peut, s'il l'estime approprié, les informer sur les services qu'il</p>

information to the spouses on any available conciliation services.	connaît et qui sont susceptibles de les aider à la conciliation.
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<i>Family Law Act, R.S.O. 1990, c. F.3, s. 5(6)</i>	<i>Loi sur le droit de la famille, L.R.O. 1990, c. F.3, s. 5(6)</i>
<p>S. 5(6)</p> <p>The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,</p> <p>(a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;</p> <p>(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;</p> <p>(c) the part of a spouse's net family property that consists of gifts made by the other spouse;</p> <p>(d) a spouse's intentional or reckless depletion of his or her net family property;</p> <p>(e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;</p> <p>(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;</p> <p>(g) a written agreement between the spouses that is not a domestic contract; or</p> <p>(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance</p>	<p>S. 5(6)</p> <p>Le tribunal peut accorder à un conjoint un montant qui est inférieur ou supérieur à la moitié de la différence entre les biens familiaux nets qui appartiennent à chacun des conjoints si le tribunal est d'avis que l'égalisation des biens familiaux nets serait inadmissible, compte tenu des facteurs suivants :</p> <p>a) le défaut d'un conjoint de révéler à l'autre des dettes ou d'autres éléments de passif qui existaient à la date du mariage;</p> <p>b) le fait que des dettes ou d'autres éléments de passif réclamés en faveur de la réduction des biens familiaux nets d'un conjoint ont été contractés de façon inconséquente ou de mauvaise foi;</p> <p>c) la partie des biens familiaux nets d'un conjoint qui se compose de dons faits par l'autre conjoint;</p> <p>d) la dilapidation volontaire ou inconséquente par un conjoint de ses biens familiaux nets;</p> <p>e) le fait que le montant qu'un conjoint recevrait autrement en vertu du paragraphe (1), (2) ou (3) est excessivement considérable par rapport à une période de cohabitation qui est inférieure à cinq ans;</p> <p>f) le fait qu'un conjoint a contracté des dettes ou d'autres éléments de passif excessivement considérables par rapport à ceux de l'autre conjoint pour subvenir aux besoins de la famille;</p> <p>g) un accord écrit entre les conjoints qui n'est pas</p>

or improvement of property.	un contrat familial; h) n'importe quelle autre circonstance concernant l'acquisition, l'aliénation, la conservation, l'entretien ou l'amélioration des biens.
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<i>The Family Property Act, C.C.S.M. c.F.25, s.2.1(1)</i>	<i>Loi sur les biens familiaux, C.P.L.M. c. F25, s. 2.1(1)</i>
S. 2.1(1) Except as herein otherwise provided, this Act applies to all spouses, whether married before or after the coming into force of this Act and whether married within Manitoba or a jurisdiction outside of Manitoba, (a) if the habitual residence of both spouses is in Manitoba; or (b) where each of the spouses has a different habitual residence, if the last common habitual residence of the spouses was in Manitoba; or (c) where each of the spouses has a different habitual residence and the spouses have not established a common habitual residence since the solemnization of their marriage, if the habitual residence of both at the time of the solemnization was in Manitoba.	S. 2.1(1) Sous réserve des exceptions prévues ailleurs dans les présentes, la présente loi s'applique à tous les conjoints, mariés avant ou après son entrée en vigueur, qu'ils se soient mariés au Manitoba ou ailleurs : a) si le lieu de résidence habituelle des deux conjoints se trouve au Manitoba; b) si le dernier lieu de résidence commune habituelle des conjoints se trouvait au Manitoba, lorsque chaque conjoint a un lieu de résidence habituelle différent; c) si le lieu de résidence habituelle des deux conjoints au moment de la célébration du mariage se trouvait au Manitoba, lorsque chaque conjoint a un lieu de résidence habituelle différent et que les deux conjoints n'ont pas établi de lieu de résidence commune habituelle depuis la célébration de leur mariage.

<i>The Family Property Act, S.S 1997, c. F-6.3, s.2(1)</i>	<i>Loi sur les biens familiaux, L.S. 1997, c. F-6.3, s. 2(1)</i>
S. 2(1) "spouse" means either of two persons who: (a) at the time an application is made pursuant to this Act, is legally married to the other or is married to the other by a	S. 2(1) «conjoint» Soit l'une ou l'autre de deux personnes qui, selon le cas : a) au moment où une requête est présentée en vertu de la présente loi,

<p>marriage that is voidable and has not been voided by a judgment of nullity;</p> <p>(b) has, in good faith, gone through a form of statutory marriage with the other that is void, where they are cohabiting or have cohabited within the two years preceding the making of an application pursuant to this Act; or</p> <p>(c) is cohabiting or has cohabited with the other person as spouses continuously for a period of not less than two years; and includes:</p> <p>(d) a surviving spouse who continues or commences an application pursuant to section 30 and who was the spouse, within the meaning of clause (a), (b) or (c), of the deceased spouse on the day of the spouse's death; and</p> <p>(e) where the applicant is a spouse within the meaning of clause (b), the other party to the void marriage; (« conjoint »)</p>	<p>sont légalement mariées ensemble ou ont contracté un mariage qui est annulable et qui n'a pas fait l'objet d'un jugement de nullité;</p> <p>b) ont de bonne foi contracté ensemble un mariage légal qui est nul, mais cohabitent ou ont cohabité durant les deux ans précédant la requête présentée en vertu de la présente loi;</p> <p>c) cohabitent ou ont cohabité comme conjoints de façon continue pendant au moins deux ans;</p> <p>la présente définition comprend également:</p> <p>d) le conjoint survivant qui continue ou introduit une requête en vertu de l'article 30 et qui était, au sens de l'alinéa a), b) ou c), le conjoint du conjoint défunt le jour de son décès;</p> <p>e) dans le cas où la partie requérante est conjoint au sens de l'alinéa b), l'autre partie au mariage nul. ("spouse")</p>
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Family Law Act, SNWT 1997, c 18, s. 1(1)	Loi sur le droit de la famille, L.T.N.-O. 1997, ch. 18, s. 1(1)
<p>S. 1(1)</p> <p>"spouse" means a person who</p> <p>(a) is married to another person,</p> <p>(b) has together with another person entered into a marriage that is voidable or void, in good faith on the</p>	<p>S. 1(1)</p> <p>«conjoint» S'entend d'une personne qui :</p> <p>a) soit est mariée à une autre personne;</p> <p>b) soit a contracté avec une autre personne, de bonne foi selon la personne qui fait valoir un droit en vertu de la présente loi, un mariage nul de nullité relative ou</p>

<p>part of the person asserting a right under this Act, or</p> <p>(c) has lived together in a conjugal relationship outside marriage with another person, if</p> <p>(i) they have so lived for a period of at least two years, or</p> <p>(ii) the relationship is one of some permanence and they are together the natural or adoptive parents of a child. (conjoint)</p>	<p>absolue;</p> <p>c) soit vit avec une autre personne en union conjugale hors des liens du mariage si, selon le cas :</p> <p>(i) elle vit ainsi avec cette personne depuis au moins deux ans,</p> <p>(ii) cette union est d'une certaine permanence et ils sont ensemble les parents naturels ou adoptifs d'un enfant. (spouse)</p>
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<i>Family Law Act, SNWT (Nu) 1997, c 18, s. 1(1)</i>	<i>Loi sur le droit de la famille, LTN-O (Nu) 1997, ch. 18, s. 1(1)</i>
<p>S. 1(1)</p> <p>"spouse" means either of a man and a woman who</p> <p>(a) are married to each other,</p> <p>(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or</p> <p>(c) have cohabited outside marriage, if they</p> <p>(i) have cohabited for a period of at least two years, or</p> <p>(ii) have cohabited in a relationship of some permanence and are together the natural or adoptive parents of a child. (conjoint)</p>	<p>S. 1(1)</p> <p>« conjoint » Soit l'homme soit la femme qui, selon le cas :</p> <p>a) sont mariés ensemble;</p> <p>b) ont contracté, de bonne foi selon la personne qui fait valoir un droit en vertu de la présente loi, un mariage nul de nullité relative ou absolue;</p> <p>c) ont cohabité en dehors des liens du mariage :</p> <p>(i) soit pendant une période d'au moins deux ans,</p> <p>(ii) soit dans une relation ayant une certaine permanence et sont ensemble les parents naturels ou adoptifs d'un enfant. (spouse)</p>

<i>Individual and Family Assistance Act, R.S.Q., chapitre A-13.1.1, s. 22</i>	<i>Loi sur l'aide aux personnes et aux familles, L.R.Q., chapitre A-13.1.1, s. 22</i>
<p>The word "spouses" means</p> <p>(1) persons who are married or in a civil union with each other and who cohabit;</p> <p>(2) persons of opposite sex or the same sex who cohabit and who are the parents of a child, unless they establish that their cohabitation is temporary and results from exceptional circumstances related</p>	<p>Sont des conjoints :</p> <p>1° les personnes liées par un mariage ou une union civile qui cohabitent ;</p> <p>2° les personnes, de sexe différent ou de même sexe, qui cohabitent et qui sont les parents d'un même enfant, sauf si elles démontrent que leur cohabitation est temporaire et résulte de circonstances</p>

<p>to a serious health problem of one of them or of one of their children;</p> <p>(3) persons of full age of the opposite or the same sex who live together in a de facto union and who, at any one time, cohabited for a period of not less than one year.</p> <p>Such persons remain spouses or, for the purposes of subparagraph 3 of the first paragraph, are presumed to have continued to cohabit despite the temporary absence of one of them.</p>	<p>exceptionnelles liées à un problème grave de santé de l'une d'elles ou d'un de leurs enfants ;</p> <p>3° les personnes majeures, de sexe différent ou de même sexe, qui vivent maritalement et qui, à un moment donné, ont cohabité pendant une période d'au moins un an.</p> <p>Ces personnes continuent d'être des conjoints ou, aux fins du paragraphe 3° du premier alinéa, sont présumées avoir continué de cohabiter malgré l'absence temporaire de l'une d'elles.</p>
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